BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office of the Washington Attorney General Complainant, v. CASCADE NATURAL GAS CORPORATION; PacifiCorp dba PACIFIC POWER & LIGHT COMPANY Respondents.	Docket No. U-030744 **PACIFICORP'S MOTION FOR SUMMARY DETERMINATION**

Pursuant to WAC 480-09-426(2), respondent PacifiCorp dba Pacific Power & Light Company ("PacifiCorp") hereby moves for summary determination with respect to the issues raised in the Complaint of Public Counsel in this proceeding and in the Petitions to Intervene of City of Toppenish ("Toppenish") and Elaine Willman, *et al.* Based on these pleadings and the evidence offered in support of this Motion, there is no genuine issue as to any material fact and PacifiCorp is entitled to summary determination in its favor. The evidence shows:

- Public Counsel is just plain wrong when it alleges that the charge imposed by the Yakama Nation Franchise Ordinance (the "Yakama Nation charge" [1]) may be collected from customers only if PacifiCorp has a franchise agreement in place with the Yakama Nation. Public Counsel is similarly incorrect in its allegation that PacifiCorp has been imposing a utility tax on customers without remitting the proceeds to the Yakama Nation.
- The undisputed facts in the record demonstrate that PacifiCorp's actions with respect to the Yakama Nation charge were prudent and in accordance with Commission precedent on the treatment of tribal utility taxes. This precedent, and the Commission's application of it to the Yakama Nation charge, have been validated by the Yakima County Superior Court upon judicial review. Public Counsel's allegations of imprudence require reversal of this clear and long-standing – and now judicially affirmed – Commission precedent, as

[1] The fee imposed by the Franchise Ordinance shall be referred to herein as the "Yakama Nation charge," which avoids characterization as either a "tax" or a "fee" for purposes of discussion in this Motion. That particular characterization is an issue, and use of the term "charge" is intended to avoid confusion on this point.

well as disregard of the Court's express findings on the prudence of PacifiCorp's conduct with respect its handling of the Yakama Nation charge.

- Public Counsel's allegations regarding the prudence of PacifiCorp's conduct prior to the tariff taking effect are irrelevant, as the time for raising such claims is prior to the tariff taking effect.
- The additional issues raised in the interventions of Toppenish and Willman, *et al.* are barred as a matter of law. The Commission's previous actions in allowing PacifiCorp to recover the Yakama Nation charge as a utility tax have been upheld in Superior Court, and cannot be challenged anew in this proceeding.

For these reasons, PacifiCorp requests that summary determination be granted in its favor, and that the Complaint of Public Counsel be dismissed.

I. BACKGROUND

On August 6, 2002, the Tribal Council of the Yakama Nation adopted Ordinance T-177-02 (the "Franchise Ordinance") requiring all utilities operating within the boundaries of the Reservation to enter into a franchise agreement with the Yakama Nation. A copy of the Franchise Ordinance is included as Exhibit A to the Affidavit of Clark Satre, which accompanies this Motion as Attachment 5. Section 3 of the Ordinance states that "[I]t shall be unlawful for any Utility to provide Utility Service to any person within the external boundaries of the Reservation without a valid Franchise obtained pursuant to the provisions of this Ordinance and any subsequent amendments." Under section 5.1 of the Ordinance, utilities are required to pay three percent (3%) of the utility's Gross Operating Revenue as a "franchise fee."

The utility owes the fee "notwithstanding that such Utility may not have entered into a Franchise [Agreement] with the Yakama Nation." *Franchise Ordinance, § 5.3.* In addition, failure to enter into a franchise agreement will result in a $1,000 fine for each day that the utility operates on the Reservation without a franchise agreement. *Id., § 6.* To avoid the penalty, a utility may enter into a "temporary franchise agreement." *Id., § 4.4.*

Both respondents PacifiCorp and Cascade Natural Gas Corporation ("Cascade") filed tariff revisions seeking rate recovery payments under the Ordinance. For PacifiCorp, the filing

was assigned Docket No. UE-021637. Because the payments under the Ordinance were most analogous to a local tax, the utilities sought recovery from ratepayers within the taxing jurisdiction. The Commission considered the utilities' tariff revisions at open meetings on November 27, 2002, December 11, 2002 and January 8, 2003. The Commission heard and considered extensive written and oral argument from its staff, the utilities, and all interested parties including the Nation, non-tribal members such as intervenor Elaine Willman and the Citizen's Standup! Committee, intervenor Toppenish, and other non-tribal communities such as the towns of Wapato and Harrah.

Ultimately, Commission Staff concluded that the proposed Cascade tariff and subsequently the proposed PacifiCorp tariff revisions had properly characterized the Yakama exaction as amounting to a tax for regulatory purposes. Included as Attachment 1 to this Motion is the Staff memorandum of January 8, 2003 in Docket No. UE-021637, in which Staff recommends approval of the PacifiCorp tariff filing. In its earlier memorandum recommending approval of the Cascade tariff filing, Staff explained the exaction was "revenue-based" rather than a "fee-for-service change" and that "[l]acking further documentation and considering the requirement in the Ordinance that [the utility] must pay the fee whether or not it enters into the franchise agreement," the exaction was in effect a tax. *Staff Memorandum of December 11, 2002, Docket No. UG-021502, pp. 4-5.* Notably, Public Counsel – the Complainant in this proceeding – did not participate in the tariff filings of either Cascade or PacifiCorp, either by filing written comments or providing oral comments during any of the three open meetings at which the tariff filings were discussed.

The Commissioners at these three open meetings heard evidence and argument from which they could conclude that it is not clearly unlawful for the utilities to recover the tax from all customers within the Reservation, including non-tribal members. The Commission therefore exercised its discretion not to suspend the Cascade and PacifiCorp tariffs, which then became effective by operation of law. *RCW 80.28.060.* This was done without Commission order or

agency action.

On January 9, 2003, Elaine Willman and the Citizens Standup! Committee filed a Petition for Review in Yakima County Superior Court, naming the Commission, PacifiCorp and Cascade as Defendants. *Case No. 03-2-00086-7.* In a Memorandum Opinion dated June 5, 2003, Yakima County Superior Court denied Plaintiffs' Motion for Partial Summary Judgment as well as PacifiCorp's and Cascade's cross motions for summary judgment. In her Memorandum Opinion, Judge Van Nuys made the following findings:

- The relevant question for purposes of reviewing the Commission's action is whether the Franchise Ordinance is "clearly unlawful." "If the right to tax is honestly debatable in law, then it is not 'clearly unlawful.'" In addressing this issue, Judge Van Nuys found that "[t]he legal issue of whether the Nation has such authority is honestly debatable."
- "When a utility company includes in its tariff a tax imposed on it, that inclusion is a prudent expense unless the tax is clearly illegal. The company is not required to mount a legal challenge to every tax imposed by every taxing authority."

A copy of the June 5, 2003 Memorandum Opinion is included as Attachment 2 to this Motion. By Order entered July 28, 2003, the Court dismissed Plaintiffs' Petition for Review as to their first claim, reiterating its finding that "the Yakama Nation's charge is not clearly unlawful." *Order, ¶ 4.* A copy of the July 28, 2003 Order is included as Attachment 3 to this Motion.

Subsequently, the Court dismissed Plaintiffs' second claim – and the Petition for Judicial Review – in an order entered August 22, 2003. That order, a copy of which is included as Attachment 4 to this Motion, includes the following finding:

- "[T]he Washington Utilities and Transportation Commission was not arbitrary or capricious when it determined that the 3% surcharge should be treated as a tax for ratemaking purposes. Thus, the Washington Utilities and Transportation Commission did not have a duty required by law to either reject or suspend and set for an adjudicative hearing, tariffs filed by PacifiCorp and Cascade Natural Gas Corporation that proposed to recover the 3% charge as a tax only from ratepayers located within the Yakama Nation Reservation."

August 22, 2003 Order, ¶5.

Public Counsel commenced this proceeding by filing its complaint on May 22, 2003.

Petitions to Intervene were filed by Elaine Willman, *et al.*,[2] Toppenish, Puget Sound Energy, Verizon Northwest, Inc., Sprint Corporation, and Charter Communications, Inc. Following a prehearing conference on August 11, 2003, Willman, *et al.* filed an Amended Petition to Intervene to request a special intervention in light of their request to broaden the issues beyond those raised in the Public Counsel Complaint. The Commission issued its Prehearing Conference Order on August 26, 2003 granting all of the requested interventions. The Prehearing Conference Order also established a procedural schedule including, among other things, a September 15 deadline for submitted dispositive motions. This Motion for Summary Determination is submitted in accordance with that schedule.

II. APPLICABLE LAW

The Commission's rules provide that a complaint may be resolved through summary determination. WAC 480-09-426 provides as follows:

> (2) **Motion for summary determination**. A party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the civil rules for superior court.

For the reasons set forth in this Motion, PacifiCorp submits that there is no genuine issue as to any material fact and PacifiCorp is entitled to summary determination in its favor dismissing Public Counsel's Complaint as a matter of law. This Motion is supported by the affidavits of Clark Satre (Attachment 5) and Carol Hunter (Attachment 6), which constitute "properly admissible evidentiary support" for the legal arguments set forth in this Motion.

III. ARGUMENT

Public Counsel's Complaint alleges three claims against PacifiCorp:

[2] 46 customers of PacifiCorp, Cascade or both.

- First Claim: PacifiCorp improperly recovered the Yakama Nation charge without having a franchise agreement with the Yakama Nation "to act as a basis for the charge," and has not actually paid the Yakama Nation charge to the Nation. *Complaint, ¶¶ 30-32.*

- Second Claim: It was imprudent for PacifiCorp to seek to impose the Yakama Nation charge as a utility tax rather than challenging the validity of the charge. *Complaint, ¶¶ 33-35.*

- Third Claim: Because PacifiCorp had a "reasonable basis under Federal law" to challenge the authority of the Yakama Nation to impose the charge and didn't, the charge is thus not prudently incurred, and rates are not lawfully recoverable from customers. *Complaint, ¶¶ 36-39.*

In addition, the interventions of Toppenish and Willman, *et al.* seek to raise a further claim:

- PacifiCorp mischaracterized the payment under the franchise fee agreement as a utility tax rather than as a franchise fee, and this treatment is not consistent with state law. *Toppenish Petition, p. 2; Willman, et al. Amended Petition, ¶ 5(b).*

For the reasons set forth below, each of these four claims may be resolved through summary determination.

A. The Franchise Ordinance Requires PacifiCorp to Pay the Yakama Nation Charge Whether or Not PacifiCorp Has Entered into a Franchise Agreement, and PacifiCorp Has Been Remitting to the Yakama Nation the Amounts Collected Pursuant to the Tariff. Public Counsel's First Claim Should be Dismissed as a Matter of Law.

In paragraph 32 of its Complaint, Public Counsel alleges that:

> "PacifiCorp's collection of charges from its customers in the absence of a franchise agreement, and its collection of charges when it was not remitting payments to the Yakama Nation was unjust, unreasonable, excessive and otherwise in violation of law."

These allegations are simply incorrect and contradict the express terms of the Franchise Ordinance, as explained below. Public Counsel's First Claim against PacifiCorp (paragraphs 30-32 of its Complaint) should therefore be dismissed as a matter of law.

1. The Franchise Ordinance Requires PacifiCorp to Pay the Yakama Nation Charge Whether or Not PacifiCorp Has Entered into a Franchise Agreement.

The Yakama Nation Franchise Ordinance, passed by the Yakama Nation Tribal Council on August 6, 2002, by its terms requires payment of a charge to the Yakama Nation irrespective of whether a utility enters into a franchise agreement with the Yakama Nation. Section 5.3 of the Franchise Ordinance provides as follows:

> 5.3 Such franchise fee [equal to three percent of Gross Operating Revenue] shall be owed by such Utility to the Yakama Nation notwithstanding that such Utility may not have entered into a Franchise with the Yakama Nation as of the effective date of this Ordinance.

Section 6 of the Franchise Ordinance further provides for penalties for operating without a franchise, including a claimed right to "prohibit all Utilities not in compliance with [the] Ordinance from serving customers on the Reservation" and to impose a penalty in the amount of "one thousand dollars ($1,000.00) for each day that such Utility is operating on the Reservation without a Franchise." *Satre Affidavit*[3] *at Exh. A.* It is thus unfounded for Public Counsel to claim that a franchise agreement must be "in place to act as a basis for the charge." *Complaint, ¶ 30.* Under the Franchise Ordinance, the obligation was imposed upon the utility whether or not a franchise agreement was in place.[4]

2. PacifiCorp Has Been Remitting to the Yakama Nation the Amounts Collected Pursuant to the Tariff.

Public Counsel is further incorrect in alleging that PacifiCorp has been collecting the 3% utility tax from customers without remitting the proceeds to the Yakama Nation. According to Mr. Satre, Regional Community Manager at PacifiCorp, the amounts collected by PacifiCorp

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[3] The affidavit of Clark Satre is included as Attachment 5 to this Motion.

[4] In fact, it is this aspect of the Franchise Ordinance that contributed to the determination that the charge is properly characterized as a utility tax rather than as a franchise fee. As Chairwoman Showalter observed at the December 11, 2002 public meeting, "it's a unilateral imposition of a charge that does not have a relationship to the cost, that looks a lot like a tax." *Transcript of December 11, 2002 Open Meeting, p. 18.*

pursuant to its tariff from customers living within the boundaries of the Yakama Nation reservation are remitted to the Yakama Nation in the subsequent month after collection. *Satre Affidavit, ¶ 5.* Mr. Satre's affidavit describes the payments that PacifiCorp has made to the Yakama Nation, which total over $216,000.

There is no basis for Public Counsel's claim that PacifiCorp's collection of charges from its customers in these circumstances "was unjust, unreasonable, excessive and otherwise in violation of law." *Complaint, ¶ 32.* PacifiCorp's collections are pursuant to a duly authorized tariff that became effective as a matter of law. The Commission's actions in allowing that tariff to become effective have been affirmed upon appeal to Yakima County Superior Court, as discussed below in Section B. PacifiCorp is collecting the fees in a manner in accordance with the tariff's provisions. *Satre Affidavit, ¶ 5.* PacifiCorp is remitting to the Yakama Nation the precise amounts collected from PacifiCorp customers living within the boundaries of the Yakama Nation Reservation. *Id., ¶¶ 4-5.* These actions are neither unjust, unreasonable, nor excessive. They fully comport with the law. Public Counsel's First Claim against PacifiCorp should therefore be dismissed as a matter of law.

B. Public Counsel's Claims of Imprudence – The Second and Third Claims – Are Barred As a Matter of Law.

Public Counsel's second and third claims, alleging imprudence by PacifiCorp with respect to its handling of the Yakama Nation charge, should be dismissed as a matter of law, under any of three possible grounds:

(1) This issue was ruled upon by the Yakima County Superior Court, and PacifiCorp's conduct was found to be prudent. That finding has preclusive effect on this issue in this proceeding.

(2) Alternatively, if the Court's findings on this issue is not accorded preclusive effect in this proceeding, the Commission can find based on undisputed evidence that PacifiCorp's handling of the Yakama Nation charge was prudent, as measured against existing Commission precedent, which is the "law" for purposes of ruling on this Motion.

(3) The claim must be barred as untimely, inasmuch as the tariff has been allowed to become effective, making PacifiCorp's pre-tariff conduct irrelevant. Public Counsel's prudence claims were required to be raised prior to the tariff taking effect.

These three alternative grounds are discussed in turn below.

1. Yakima County Superior Court Ruled that PacifiCorp's Conduct Was Prudent.

a. The Court Affirmed the Commission's Standard with Respect to the Regulatory Treatment of Utility Tribal Taxes.

The Commission has followed a clear policy with respect to tribal utility taxes for over a decade. The current Commission ratemaking approach to tribal taxes was developed in the context of a gross receipts tax assessed by the Lummi Indian Tribe ("Lummi") on utilities serving the Lummi reservation. In 1991, U S WEST (now Qwest) filed a tariff revision that proposed to pass on the tax only to ratepayers on the reservation, both tribal and non-tribal. Several parties participated in the subsequent hearings, including GTE (now Verizon), Puget Sound Power & Light Company (now Puget Sound Energy), a group called the Fee Land Owners Association (FLOA) consisting of non-Indians owning fee lands within the reservation, and the Commission staff. In an August 1992 Initial Order, the presiding Administrative Law Judge recommended that the Commission accept the tariff revision proposed by U S WEST. The ALJ held that the Commission's jurisdiction was limited to determining whether the proposed rate was just, fair, reasonable and sufficient, and, in that regard, the Commission could inquire into the prudence of U S WEST's payment of the Lummi tax. According to the decision, that inquiry required the Commission to examine whether the Lummi tax was clearly unlawful. If the tax were clearly unlawful, it would be imprudent for U S WEST to pay the tax and any such payment would be *disallowed* for ratemaking purposes. On the other hand, if the tax were not clearly unlawful, it would be prudent for U S WEST to pay the tax and any such payment would be *allowed* for ratemaking purposes.

The ALJ reviewed applicable federal case law and held that the Lummi utility tax was

not clearly unlawful.[5] According to the Initial Decision in that proceeding:

> Given Federal court decisions, the Lummi utility tax is arguably valid. It is certainly not clearly invalid.

Docket No. UT-911306, First Supplemental Order, p. 5. Thus, US WEST's payment of the tax was prudent: "The relatively small amount of the Lummi tax on [U S WEST] does not justify the expenditure of many times more dollars on a court challenge to the tax, particularly when Federal case law supports the validity of such a tax." *Id.* Therefore, the ALJ approved U S WEST's proposal to pass-through the Lummi tax to tribal and non-tribal members on the reservation. The Commission adopted the Initial Decision as the Commission's final order, and no party petitioned for judicial review. *Docket No. UT-911306, Second Supplemental Order, Oct. 1992.*

This precedent was affirmed last year in Docket No. UT-010988, *et al.*, which involved a complaint by twenty-seven individual owners of fee land on the Lummi and Swinomish Indian Tribe reservations against utilities doing business on those reservations. The utilities included Qwest, Sanitary Service Company, Puget Sound Energy, Verizon Northwest, and Waste Management of Washington. Those companies were including tribal taxes in their rates for service to tribal and non-tribal members. The fee land-owners alleged that that practice was unlawful, relying on then-recent case law, including *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), and *Big Horn Electric Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000). In January

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[5] The ALJ reviewed cases that upheld the taxing authority of Indian tribes over non-Indians on tribal and non-tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal tax on non-Indian companies extracting oil and gas from tribal lands upheld); *Burlington Northern Railroad Company v. The Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3013 (1992) (tribal tax on utility rights-of-way and utility property upheld); and *Snow v. Quinalt Indian Nation*, 709 F.2d 1319 (9th Cir. 1983) (tribal license fee and tax on businesses on fee land within reservation upheld); *Brendale v. Confederated Tribes and Bands of the Yakama Indian Nation*, 492 U.S. 408 (1989) (civil zoning power upheld over only non-Indian land in "closed areas" of Reservation that had maintained their "Indian character") did not clearly invalidate the Lummi tax since U S WEST did business on fee and trust lands throughout the reservation in order to provide service to tribal and non-tribal members.

2002, the Commission in *Brannan v. Qwest*, Docket No. UT-010988, *et al.*, granted Qwest's motion for summary determination, essentially adopting the 1992 rationale of the Lummi case and distinguishing *Atkinson* and *Big Horn Electric*. According to the Commission's January 2002 Order Granting Summary Determination:

> [T]he Commission has jurisdiction to reject a utility's pass-through to customers of a tax that is clearly invalid, on the grounds that the utility's payment of that tax is not a prudent expense and its collection from customers is therefore imprudent.
> . . . .
> [W]e conclude that that cases cited by Complainants fail to establish that the tribal utility taxes are clearly illegal. Until a court of competent jurisdiction has ruled that the tribal utility tax, or an analogous tax, is clearly illegal, we will not reject the pass-through of the Lummi and Swinomish utility taxes.

Order, ¶¶ 43, 52. No party appealed that decision.

When Cascade and PacifiCorp in late 2002 filed their proposals to recover the Yakama Nation charge through a utility tax, the Commission followed the rationale of the Lummi case that the agency had affirmed just recently in *Brannan*. Following this precedent, the Commission determined that because the Yakama Nation charge could not be found to be "clearly unlawful," the Commission did not have a duty to reject or suspend the utilities' tariff filings.

Included in the issues on appeal to Yakima County Superior Court was whether the Commission was correct in applying this standard. On this point, the Court affirmed the Commission's standard:

> A related question is posed here: Whether the ordinance is ***clearly unlawful*** for purposes of reviewing the commission's action. If the right to tax is honestly debatable in law then it is not "clearly unlawful."
> . . . .
> Taxes are presumed to be legal until declared by a court of competent jurisdiction to be otherwise. When a utility company includes in its tariff a tax imposed on it, that inclusion is a prudent expense unless the tax is clearly illegal. The company is not required to mount a legal challenge to every tax imposed by every taxing authority.

June 5, 2003 Memorandum Opinion, pp. 6-7 (emphasis in original). Thus, the Commission's

approach with respect to the ratemaking treatment of tribal utility taxes has been upheld.

b. In Applying this Standard, the Court Agreed that the Yakama Nation Charge Could Not be Found to be "Clearly Unlawful."

Plaintiffs in the Yakima County Superior Court proceeding argued that the Yakama Nation charge was clearly unlawful, and that the Commission thus had a legal duty to reject or suspend the utilities' tariffs. In rejecting Plaintiffs' Motion for Summary Judgment on this issue, the Court agreed with the utilities and the Commission that the Yakama Nation charge could not be found to be "clearly unlawful:"

> If the right to tax is honestly debatable in law, then it is not "clearly unlawful."
> . . . .
> The legal issue of whether the Nation has such [taxing] authority is honestly debatable. Plaintiffs cite *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) in support of their position that the Nation has no authority to impose a tax on non-members. The facts in *Atkinson* are clearly distinguishable. . . .
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> Arguably, *Montana v. United States*, 450 U.S. 544 (1981) does not apply since the "tax" is a franchise fee imposed directly on the utility companies. The Commission allowed it to be passed through to the consumers via the tariff revision.

June 5, 2003 Memorandum Opinion, pp. 6-7. Thus, the Commission's specific application of the standard to the circumstances of the Yakama Nation charge has been upheld.

c. The Court Found that PacifiCorp's Conduct Satisfied the Applicable Standard.

With respect to the issue of whether or not PacifiCorp's conduct satisfied the applicable standard, the Court found that it was reasonable for a utility not to challenge a tax unless the "clearly illegal" standard could be met:

> Taxes are presumed to be legal until declared by a court of competent jurisdiction to be otherwise. When a utility company includes in its tariff a tax imposed on it, that inclusion is a prudent expense unless the tax is clearly illegal. *The company is not required to mount a legal challenge to every tax imposed by every taxing authority.*
>
> The tariff revision reflecting a 3% fee would be imprudent, and thus not allowed,

> if there was no rational basis for it. . . .
>
> The fee or tax is on the gross revenue of the [utilities]. Their revenue has a clear nexus to the utilities' activities, namely, providing service to all customers on the Reservation. This nexus is rationally based.

June 5, 2003 Memorandum Opinion, p. 7. Thus, the Court found that PacifiCorp's response to the Yakama Nation charge was reasonable, and in accordance with the standard followed by the Commission and approved by the Court.

Moreover, the Court expressly rejected the standard suggested by Public Counsel in its Complaint – that a utility is imprudent if it fails to challenge a tribal utility tax[6] – and found, instead, that a utility is "not required to mount a legal challenge" unless it can find that the charge is "clearly illegal." This is the course of action followed by PacifiCorp, and this course of action has been found to be reasonable by the Yakima County Superior Court.

d. The Court's Findings Have Preclusive Effect on this Issue in this Proceeding.

The Court's findings should conclusively act as a bar to relitigating these issues under the doctrine of collateral estoppel. "The doctrine of collateral estoppel is well known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal. Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties." *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (*quoting Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 449, 951 p.2d 782 (1998)). The Commission recognizes that collateral estoppel, also known as issue preclusion, bars reconsideration of an issue already decided by the Commission or "another

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[6] It is clear from the discussion at the prehearing conference that Public Counsel is advocating a different standard than the Commission has previously applied. In response to a question from Judge Moss as to whether Public Counsel is going to ask the Commission "to find that there is an affirmative obligation on the part of regulated companies to conduct an investigation through the federal courts, if necessary, to determine the lawfulness of a charge before the Commission can act on it," Mr. ffitch responded: "***Well, yes, in the sense that that's part of the prudence determination***, but we wouldn't be asking for the adoption of that as an inflexible rule in every case." (Tr. 36, emphasis added.)

tribunal of competent jurisdiction." *United & Informed Citizen Advocates Network, Docket No. UT-971515, Third Supplemental Order (Jan. 1998) at note 4.* Thus, the decision of the Yakima County Superior Court in the prior action may bind the Commission in the instant proceeding.

Collateral estoppel should be invoked where (1) the issues in both cases are identical; (2) the first action resulted in a final judgment on the merits; (3) the party against whom the doctrine is invoked was a party to or in privity with a party to the first action; and (4) applying the doctrine would not work an injustice against the party to whom it is applied. *City of Des Moines v. $81,231*, 87 Wn. App. 689, 700, 943 P.2d 669 (1997). These factors are satisfied in this instance.

First, there is no question that the issues are identical. The proper regulatory treatment and prudence of the payments (*i.e.*, whether the Yakama Nation charge was "clearly unlawful") were decided and upheld on appeal.

Second, a final judgment was reached when the Yakima County Superior Court entered summary judgment on this issue. A grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial on the issue. *Nat'l Union Fire Ins. Co. v. Northwest Youth Serv.*, 97 Wn. App. 226, 232-33, 983 P.2d 1144 (1999).

Third, there is no doubt that the doctrine applies to Willman, *et al.*, as they were plaintiffs in the court proceeding. Moreover, the doctrine also applies to Public Counsel and to Toppenish, because they sit in privity with Willman, *et al.* Public Counsel is charged with protecting the public interest, including the citizens residing within the boundaries of the Yakama Reservation, and including Willman, *et al. RCW 80.01.100; RCW 80.04.510.* Likewise, the City of Toppenish, located within the boundaries of the Yakama Reservation, claims to represent "the City and its residents," which also naturally places them in privity with Willman, *et al.* Thus, the third factor is satisfied.

Last, it is clear that an injustice will not be invoked against Public Counsel or the intervenors because they had an ample opportunity to present their case in the prior proceeding.

Rather, precluding the relitigation of these issues averts injustice. *Nat'l Union Fire Ins. Co.*, 97 Wn. App. at 233-34, 983 P.2d 1144 (1999). If Public Counsel were allowed to rehash issues that were previously determined merely because it chose not to become involved in the first instance, then Public Counsel could always choose to sit in the sidelines and see how an action progresses before participating or taking a position. Surely such a sit-and-wait approach does not promote the public interest. Accordingly, the test for applying collateral estoppel has been met.

The Yakima County Superior Court addressed and ruled upon the Commission's standard for the ratemaking treatment of a tribal utility tax, and validated that standard. The Court similarly affirmed the findings of the utilities as well as the Commission that the Yakama Nation charge is not "clearly unlawful." Finally, the Court found the utilities' actions with respect to the Yakama Nation charge to be reasonable, inasmuch as a utility does not have an obligation to challenge a tax that is not "clearly unlawful." Given these findings by the Yakima County Superior Court, coupled with the principles of collateral estoppel, these issues need not be relitigated in this proceeding. Public Counsel's Second and Third Claims should be dismissed as a matter of law.

2. The Undisputed Evidence Establishes that PacifiCorp Acted Prudently and In Accordance with Commission Precedent in its Handling of the Yakama Nation Charge.

a. The Commission's Standard Requires PacifiCorp to Determine Whether the Charge was Clearly Illegal, Which the Company Did.

As discussed above, the Commission's precedent with respect to the ratemaking treatment of tribal utility taxes required PacifiCorp to make a determination as to whether the Yakama Nation charge was "clearly unlawful." Unless PacifiCorp could find that the charge was "clearly unlawful," it was appropriate for the utility to proceed with a tariff filing to seek to recover the charge through a utility tax.

PacifiCorp followed this course of action. As described in the Affidavit of Carol Hunter,[7] upon being notified of the enactment of the Yakama Nation Franchise Ordinance, PacifiCorp communicated with its legal counsel regarding the legal, regulatory, and jurisdictional implications of the Franchise Ordinance. *Hunter Affidavit, ¶ 4.* PacifiCorp was satisfied based on its analysis that the Franchise Ordinance, and the charge imposed thereunder, was not "clearly illegal." *Id., ¶ 5.* PacifiCorp therefore proceeded with its tariff filing with the Commission on December 11 to seek to recover the Yakama Nation charge in rates as a utility tax imposed on its customers residing within the boundaries of the Yakama Nation Reservation.

This was the conduct required of PacifiCorp under the applicable Commission standard. PacifiCorp conducted the necessary analysis to determine whether or not the applicable standard could be met. Only after doing so did the utility proceed with the tariff filing. There is no genuine issue as to any material fact regarding PacifiCorp's actions.

b. The Existing Standard Is the "Law" for Purposes of Ruling on a Motion for Summary Determination.

Although Public Counsel by its Complaint seeks to impose a different requirement on utilities when faced with the imposition of a tribal utility tax – that a utility is imprudent if it fails to challenge the tax – that is not the standard by which this Motion for Summary Determination should be decided. Rather, the "law" for purposes of ruling on this Motion is the Commission's existing standard. As described above, the Commission's existing standard is well-established in the Lummi decision from 1992, as affirmed more recently in the *Brannan* decision. In ruling on this Motion, the Commission should look to its clear and long-standing precedent and should not contemplate a change in the law as it exists, absent a showing that the law is incorrect or harmful. *Howe v. Douglas County*, 146 Wn.2d 183, 191-92, 43 P.3d 1240 (2002). The doctrine of *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal

[7] The affidavit of Carol Hunter is included as Attachment 6 to this Motion.

principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Bishop v. Miche*, 137 Wn.2d 518, 529, 973 P.2d 465 (1999) (*quoting Keene v. Edie*, 131 Wn.2d 822, 831 ,35 P.2d 588 (1997)). This substantial burden is not easily overcome and Public Counsel makes no such showing. *Int'l Brotherhood of Electrical Workers v. Trig Electric Construction Co.*, 142 Wn.2d 431, 442, 13 P.3d 622 (2000); *Waremart v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 634-35, 989 P.2d 425 (1999). The validity of Public Counsel's complaint must be judged based on the law as it exists, and cannot be based upon an assumed departure from the Commission's clear and long-standing precedent regarding the ratemaking treatment of tribal utility taxes.

c. PacifiCorp Correctly Determined that the "Clearly Illegal" Standard Could Not be Met.

PacifiCorp correctly applied the "clearly illegal" standard, as affirmed in the rulings of the Yakima County Superior Court. As discussed above, the Court agreed with the utilities and the Commission that the Yakama Nation charge could not be found to be "clearly unlawful:"

> If the right to tax is honestly debatable in law, then it is not "clearly unlawful."
> . . . .
> The legal issue of whether the Nation has such [taxing] authority is honestly debatable.

June 5, 2003 Memorandum Opinion, p. 6.

3. Public Counsel's Claims of Imprudence Must be Barred as Untimely Because Once the Tariffs Became Effective, PacifiCorp's Conduct Prior to the Tariff Effective Date Is Irrelevant and Cannot be Claimed to be Imprudent.

Any challenge regarding the prudence of the utility's actions in not contesting the tax should have been made at the time the tariff revisions were submitted to the Commission. Utilities are required to file with the Commission schedules showing all rates and charges, forms of contract, and rules and regulations relating to rates, charges or services. *RCW 80.28.050.* Any changes to tariffs must be filed within thirty days of the effective date. *RCW 80.28.060.* Unless

suspended by the Commission, the change becomes effective, and the rates therein are presumptively reasonable. In any subsequent challenge, the party challenging a presently effective tariff bears the burden of proving that those rates are unreasonable. *North Coast Power Co. v. Kuykendall*, 117 Wn. 563 (1921); *State v. Public Service Commission of Washington*, 76 Wn. 492 (1913). Here, Public Counsel bears – but cannot sustain – that burden.

Because the tariff revisions already took effect, the relevant inquiry is not about the prudence of the utility's pre-filing conduct. Rather, the relevant inquiry is whether the effects of the tariff are lawful. Absent special circumstances, an inquiry regarding the prudence of the Company's actions should be made at the time the tariff provisions are proposed, not after the tariff revisions take effect. *Cf, PacifiCorp, Docket No. UE-991832, Third Supplemental Order (Aug. 2000) at ¶¶ 61-67* (allowing deferral of prudence issues to next rate case in light of settlement proposal). The prudence of the costs incurred ordinarily is reviewed *before* the costs are allowed in the tariffed rates, not after. *Washington Utilities & Transportation Commission v. Puget Sound Power & Light Co., Docket No. U-81-41, Sixth Supplemental Order (Dec. 1988).*

A challenge concerning the Company's duty to investigate the legality of the Ordinance should have been made during the Commission's review of the tariff revisions. That challenge was not presented. The Commission openly deliberated PacifiCorp's tariff revisions during its open meeting on January 8, 2003.[8] Members of the public, including some of the parties to the current proceeding, challenged the filing and presented arguments as to why the revisions should not take effect. Notably, Public Counsel did not participate in the discussion of this item at the Commission's open meeting, nor did Public Counsel raise in any manner in Docket No. UE-021637 its contention that PacifiCorp was imprudent for not challenging the validity of the Yakama Nation charge. Ultimately, the Commission determined that there was no

[8] The Commission also conducted deliberations on Cascade's filing relating to the Ordinance during its open meetings on November 27 and December 11, 2002. The Commission deliberations are reflected in approximately 80 pages of transcript. *See Cascade Natural Gas*, Docket No. UG-021502; *PacifiCorp*, Docket No. UE-021637.

reasonable basis to suspend the tariff, and no evidence or argument was presented to ultimately dispute that decision. The Commission declined to suspend the filing and allowed the tariff revisions to take effect by taking no action on the item. *RCW 80.28.060; RCW 80.04.130.*

Once a tariff revision becomes effective, any challenge to the lawfulness of the tariff must be forward-looking and the utility's pre-filing conduct becomes irrelevant. It is axiomatic that the lawfulness of a tariff may be challenged prospectively, not retroactively. Indeed, "when a scheduled rate is challenged, the challenge affects the rate only from the date of the filing of the complaint, and there can be no reparation for alleged excessive charges imposed prior to that time." *Model Water & Light Co. v. Dep't of Public Service of Washington*, 199 Wn. 24, 33 (1939) and cases cited therein. The time to present arguments on the extent of the utility's conduct in not challenging the validity of the Ordinance should have been made when the tariff revision was first considered by the Commission. The opportunity to assert that the utility's conduct was imprudent passed once the tariff revisions became effective.

C. The Commission's Characterization of the Yakama Nation Charge as a Utility Tax Rather than a Franchise Fee has been Affirmed on Judicial Review, and Cannot be Raised Anew by Toppenish and Willman in this Proceeding.

Both City of Toppenish and Willman, *et al.* by their interventions broaden the issues to include a re-examination of the Commission's previous actions allowing the PacifiCorp tariff to take effect. The Toppenish Petition to Intervene states that:

> Unlike Public Counsel, the City does not address the authority of the Nation to require such franchise fees. However, allowing Cascade and PacifiCorp to recharacterize the franchise fee as a municipal tax is not consistent with state law.

Toppenish Petition, p. 2. The Willman, *et al.* Amended Petition, for its part, states that:

> Petitioners request the Commission to rule on the further issue . . . whether the respondent utilities' payment of the fee demanded by the Yakama Nation's Franchise Ordinance should be included in general rates borne by all ratepayers of respondent utilities, as a franchise fee, rather than passed through solely to ratepayers within the Yakama Indian Reservation, as a local tax.

Willman, et al. Amended Petition, ¶ 5(b).

In its Prehearing Conference Order, the Commission granted the petitions to intervene, and the broadening of issues occasioned thereby. According to the Order, "administrative convenience favors granting the petitions for special intervention, for expansion of the issues to reach the question of characterization of the charge imposed by the Yakama Nation." *Prehearing Conference Order, ¶ 8.* Although the Commission ruled that "[t]he question of the regulatory characterization of the charges may be addressed" (*Id., ¶ 9*), this ruling does not preclude the issue from being resolved through a Motion for Summary Determination. In fact, dismissing the issue as a matter of law is the proper means of "addressing" the issue.

Summary determination is warranted as to this issue. The issue of the Commission's characterization of the Yakama Nation charge was the precise matter at issue in the Yakima Superior Court proceedings. In that case, Plaintiffs' Claim 2 sought to order the Commission to require PacifiCorp and Cascade to recover the Yakama Nation charge as a fee from all customers throughout the companies' service territories. In other words, Plaintiffs claimed that the Commission "mischaracterized" the charge as a utility tax rather than a franchise fee in allowed the PacifiCorp and Cascade tariffs to become effective as filed. This issue was thoroughly briefed by all parties to the Yakima Superior Court proceeding in connection with Plaintiff's Motion for Summary Judgment on Alternative Claim for Relief. After considering these arguments, the Court denied the Motion, and dismissed the claim. According to the Court's August 22 order:

> "[T]he Washington Utilities and Transportation Commission was not arbitrary or capricious when it determined that the 3% surcharge should be treated as a tax for ratemaking purposes. Thus, the Washington Utilities and Transportation Commission did not have a duty required by law to either reject or suspend and set for an adjudicative hearing, tariffs filed by PacifiCorp and Cascade Natural Gas Corporation that proposed to recover the 3% charge as a tax only from ratepayers located within the Yakama Nation Reservation."

August 22, 2003 Order, ¶5.

Thus, the Commission's earlier action with respect to PacifiCorp's tariff filing in Docket No. UE-021637 has been upheld on judicial review. In that docket, the Commission rejected the claims of Willman, *et al.* regarding mischaracterization of the Yakama Nation charge. The Commission's actions doing so were appealed and the Commission's rejection of these claims has been affirmed. There is no basis in the law for revisiting this issue in this proceeding. In fact, these issues are precluded from reconsideration in this proceeding as a matter of law, under the doctrine of collateral estoppel. Applying the four-part test from *City of Des Moines*, as discussed above, it is clear that these factors are satisfied with respect to the claims of Toppenish and Willman, *et al.*

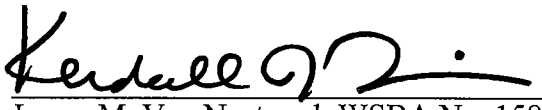
First, there is no question that the issues are identical. The proper regulatory treatment of the tax (*i.e.*, tax vs. fee) was decided and upheld on appeal. Second, a final judgment was reached when the Yakima County Superior Court entered summary judgment on this issue in its August 22, 2003 order (Attachment 4). Third, there is no doubt that the doctrine applies to Willman, *et al.*, as they were litigants in the court proceeding, and applies as well to Toppenish, because they sit in privity with Willman, *et al.* Finally, it is clear that an injustice will not be invoked against Willman, *et al.* and Toppenish because they had an ample opportunity to present their case in the prior proceeding. Rather, precluding the relitigation of these issues averts injustice. *Nat'l Union Fire Ins. Co.*, 97 Wn. App. at 233-34, 983 P.2d 1144 (1999). Accordingly, the test for applying collateral estoppel has been met. The Yakima County Superior Court affirmed the Commission's characterization of the Yakama Nation charge as a utility tax. Given these findings by the Yakima County Superior Court, coupled with the principles of collateral estoppel, these issues need not be relitigated in this proceeding. The claims raised by Toppenish and Willman, *et al.* in their interventions should be dismissed.

IV. CONCLUSION

For the reasons stated above, the Commission should grant PacifiCorp's Motion for Summary Determination with respect to the issues raised in the Complaint of Public Counsel in this proceeding and in the Petitions to Intervene of Toppenish and Elaine Willman, *et al.* There is no genuine issue as to any material fact, and PacifiCorp is entitled to summary determination in its favor as a matter of law.

DATED: September 15, 2003.

STOEL RIVES LLP



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Attachments

1. Staff Memo of January 8, 2003 in PacifiCorp tariff filing, Docket No. UE-021637.

2. Yakima County Superior Court Memorandum Opinion of June 5, 2003.

3. Yakima County Superior Court Order dated July 28, 2003 Denying Plaintiffs' Motion for Summary Judgment and Dismissing Petition for Judicial Review, in Part.

4. Yakima County Superior Court Order dated August 22, 2003 Denying Plaintiffs' Motion for Summary Judgment on Alternative Claim and Dismissing Petition for Judicial Review.

5. Affidavit of Clark Satre
(Exhibit A: Yakama Nation Franchise Ordinance)

6. Affidavit of Carol Hunter